FILE COPY

SEP 11 1931
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 6

DE LAVAL STEAM TURBINE COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER.

GEORGE C. HOLTON,
JOHN S. FLANNERY,
Counsel for Petitioner.

GEORGE F. LOSCHE,
FRANK F. NESBIT,
Of Counsel.

INDEX.

Subjects.

	Page
1. Jurisdiction	1
2. The statute	1
3. Statement of facts	2
4. Petitioner's claims	6
5. Decision of Court of Claims	7
6. All profits denied	8
7. Court's opinions and conclusions	8
8. Questions for decision	9
9. Argument:	
I. The Court of Claims found that the three private contracts were requisitioned, but erred in holding that such requisitions took no property from petitioner	9
II. The Court of Claims erred in holding as to the three private contracts that petitioner's right to recover must be based on cancellation	15
III. The decision of the Court of Claims is based upon an erroneous interpretation and application of the Russell Motor Car Company and Brooks-Scanlon cases, supra	16
IV. Petitioner is entitled to just compensation in an amount which will put it in as good position pecuniarily as it would have been in if its contract rights and materials had not been expropriated	19
V. The just compensation to which petitioner is entitled should include the profits petitioner would have made by performance of the requisitioned contracts.	24
10. Conclusion	28
Appendix A. Act of June 15, 1917 (40 Stat., 182), Emergency Shipping Fund	29

Statutes Cited.

Act of June 15, 1917, 40 Stat., 182	1
Act of February 13, 1925, Judicial Code, Sec. 240	1

AUTHORITIES CITED.

	Page
American Hawaiian S. S. Co. v. U. S., 283 Fed., 535; 263 U. S., 727; 44 Sup. Ct. Rep., 136	27
Bauman v. Ross, 167 U. S., 548	20
Booth & Company, Inc., v. U. S., 61 C. of Cls., 805	27
Brooks-Scanlon v. U. S., 265 U. S., 106	2, 10, 11, 16, 19, 20, 22
Campbell v. U. S., 266 U. S., 368, 371	14, 19, 21, 27
Duckett v. U. S., 266 U. S., 149; 60 C. Cls., 1034	11, 27
Guerini Stone Co. v. Carlin Construction Co., 248 U. S., 334, 347	23
Hinckley v. Pittsburgh Steel Co., 121 U. S., 264	25
Ingram-Day Co. v. McLouth, 275 U. S., 471	18
International Paper Co. v. U. S., 282 U. S., 399	13
Liggett & Myers v. U. S., 274 U. S., 215, 220	11, 20
Masterton v. Mayor, 7 Hill., 61	25
Monongahela Navigation Co. v. U. S., 148 U. S., 312	12, 20, 25
Phelps v. U. S., 274 U. S., 341; 61 C. Cls., 1044	14, 19, 27
Prince Line, Ltd., v. U. S., 283 Fed., 535	27
Russell Motor Car Co. v. U. S., 261 U. S., 514	8, 17, 18
Russian Volunteer Fleet v. U. S., 282 U. S., 481	16
Seaboard Air Line v. U. S., 261 U. S., 299, 304	20, 21
Standard Oil Co. v. Southern Pacific Ry. Co., 268 U. S., 146	23
U. S. v. Behan, 110 U. S., 338	22, 25
U. S. v. Chandler-Dunbar Co., 229 U. S., 53	21
U. S. v. New River Colleries, 262 U. S., 341, 343	20, 21, 27
U. S. v. Purcell Envelope Co., 249 U. S., 313, 320	22, 25
U. S. v. Spearin, 248 U. S., 132, 135	23
Williston on Contracts, Volume III, Section 1338	23

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 6

DE LAVAL STEAM TURBINE COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER.

Jurisdiction.

This cause is here on writ of certiorari granted April 20th, 1931 (R. 107), under Sec. 3 (*b*) of the Act of February 13th, 1925 (Judicial Code, Sec. 240), to review a judgment of the Court of Claims entered April 30th, 1930 (R. 79).

The Statute.

The statute is the Act of June 15th, 1917, known as the "Emergency Shipping Fund Act" (40 Stat. 182).

The pertinent portion thereof is set forth as Appendix A.

Statement of Facts.

The case is similar to *Brooks-Scanlon Corporation v. United States* (265 U. S. 106), in that it involves just compensation for contract rights requisitioned. Here, however, the manufacturer or producer is seeking compensation; whereas there suit was brought by the purchaser.

Counsel for respondent in their memorandum setting forth the reasons for not opposing the petition for a writ of certiorari, frankly stated:

> "The precise question here involved seems never to have been decided by any other court. We know of no similar pending cases, but the question can hardly be dismissed as one of no general importance, as it involves the construction of a Federal statute, in the light of the constitutional obligation of the United States to provide just compensation. The petitioner's brief discusses the cases in this Court which have some bearing upon the question here involved. We know of no other cases which are helpful."

Petitioner is, and at all times hereinafter mentioned was, a New Jersey corporation engaged in the business, among other things, of manufacturing marine steam turbines and reduction gears and spare parts therefor (F. 1, R. 81).

Prior to January 12, 1918, petitioner had entered into thirteen written contracts with various private firms and corporations for the manufacture by it of

certain De Laval steam turbine propulsion units for ships (F. 2, R. 81). All of these contracts were requisitioned by the Government but there is no controversy except as to three of them, hereinafter referred to as private contracts and briefly described as follows:

(*a*) Supple & Ballin contract made May 18, 1917, for construction by petitioner of four marine turbine sets including furnishing materials therefor at contract price of $156,000 (R. 27);

(*b*) Standifer contract made December 31, 1917, for construction by petitioner of ten marine turbine sets including furnishing materials therefor at contract price of $735,000 (R. 39);

(*c*) Turbine Equipment Co.-Luckenbach contract made March 15, 1917, for construction by petitioner of four marine turbine sets including furnishing materials therefor at contract price of $216,000 (R. 52), as supplemented by orders of Turbine Equipment Company dated respectively April 16, 1917, and May 5, 1917, and accepted by petitioner, for certain spare parts for said four turbine sets at agreed price of $12,530 (R. 61).

Before the requisitions the respective purchasers under these contracts made payments to petitioner on account of the contracts as follows: Supple & Ballin $15,000 (F. 2, R. 81; F. 15, R. 88); Turbine Equipment Co. $68,559 (F. 2, R. 81; F. 15, R. 88); G. M. Standifer Construction Corporation $73,500 (F. 2, R. 81; F. 15, R. 88).

Early in 1918, petitioner was performing these contracts when respondent, acting through the United States Shipping Board Emergency Fleet Corporation, pursuant to the Act of Congress approved June 15, 1917, known as the "Emergency Shipping Fund Act" (40 Stat. 182), and the executive order of the President of the United States, dated July 11, 1917, requisitioned the contracts and the turbines and material to be delivered thereunder, and required and ordered petitioner to complete the same for the benefit of the United States (F. 2, R. 81; Fs. 3, 4 and 5, R. 82; R. 36, 50, 63).

About April 20, 1918, respondent, acting by the United States Shipping Board Emergency Fleet Corporation, agreed to purchase from petitioner and petitioner agreed to sell to it certain spare parts for the turbine equipments being constructed by petitioner under the three private contracts before mentioned. This contract was subsequently modified by eliminating therefrom certain spare parts, and the contract or purchase order as amended was referred to as P. D. 1779 (F. 5, R. 83).

After the requisitions, petitioner continued the performance of its obligations under said private contracts as directed by respondent for its benefit for about one year when respondent, on account of the general curtailment of the Fleet Corporation's program of ship construction subsequent to the signing of the armistice (R. 83), ordered petitioner to stop all work under said contracts and purchase order No. P. D. 1779, except on one of the ten sets of turbine equip-

ment specified in the Standifer contract and one set of spare parts therefor (F. 8, R. 84; F. 14, R. 87). Thereafter petitioner completed and delivered to respondent said one set of turbine equipment and fourteen of the pumps called for by that contract (F. 10, R. 85).

On receipt of respondent's orders to stop work, petitioner complied (F. 8, R. 84) and stored the materials it had acquired and assembled for performance of the contracts in its machine shop and casting yard (F. 7, R. 84), until January 14, 1920, when respondent, by agreement with petitioner, released said materials from the effect of the requisition orders, and petitioner took them over at an agreed salvage value of $20,149.88 for which respondent took credit (Fs. 7 and 8, R. 84, 85).

Petitioner's actual costs and expenditures incurred in and about the performance of the Supple & Ballin contract to the time respondent directed it to stop work thereon were $45,918.73. It could have completed performance at a further cost of $66,122.45 and would have made profits of $37,959.16 by fully performing (F. 9, R. 85).

Petitioner's actual costs and expenditures incurred in and about performance of the Standifer contract to the times respondent directed it to stop work thereon were $169,772.74 with respect to the nine turbines on which work was stopped. Petitioner could have completed performance of said contract at a total cost (including said $169,772.74) of $416,234.50 and would have made profits thereby of $318,765.50 (F. 10, R. 85).

Petitioner's actual costs and expenditures incurred in and about performance of the Turbine Equipment-

Luckenbach contract to the time respondent directed it to stop work thereon were $73,008.16. It could have completed performance at a further cost of $141,582.69 and would have made profits of $13,939.15 by fully performing (F. 11, R. 86).

Petitioner's actual costs and expenditures incurred in and about performance of purchase order P. D. 1779 to the times respondent directed it to stop work thereon were $9,029, exclusive of the cost of a set of spare parts delivered to and paid for by the Fleet Corporation. Petitioner could have completed performance of that part of P. D. 1779 upon which work was ordered stopped at a further cost of $16,586.22 and would have made profits of $33,193.78 by fully performing that part of said contract (F. 12, R. 86).

At all times petitioner was ready, willing and able to complete the contracts (F. 6, R. 83).

Thereafter, petitioner presented its claim for just compensation to the Emergency Fleet Corporation and on May 19, 1920, that corporation awarded petitioner $88,723.63 as just compensation. Petitioner refused to accept such award and, pursuant to said Act of June 15, 1917, elected to take 75 per cent of the award and to sue the respondent for such further sum as added to 75 per cent would make up just compensation (F. 5, R. 75; F. 5, R. 83).

Petitioner's Claims.

Thereafter, petitioner instituted this suit in the Court of Claims to recover $583,396.65, plus interest, as just compensation for (1) the three private con-

tracts which were requisitioned as before stated, (2) cancellation of respondent's purchase order No. P. D. 1779 (dated April 30, 1918) for spare parts for the turbine equipment covered by the last mentioned three contracts, and (3) for extra costs and expenses incurred by petitioner in storing and handling materials after suspension of the aforementioned contracts and for extra work caused by such suspension.

Decision of Court of Claims.

On April 30th, 1930, the Court of Claims filed special findings of fact (R. 81), conclusions of law and opinion (R. 89), holding that petitioner was entitled to recover $84,074.34, with interest from August 17th, 1920, until paid, and also $8,500, with interest from March 17th, 1919, until paid. The Court appears to have computed this compensation as follows:

The excess of the petitioner's actual costs and expenditures over the cash payments received on the contracts totaled $116,231.66 (R. 88, 89). To this sum the Court added $30,000 for extraordinary expense due to stoppage of work (R. 88, 98, 95), and $15,000 for cost of storing materials after the work was stopped (R. 98, 84). From this total it subtracted the salvage value of the materials, $20,149.88 (R. 97, 85), and the seventy-five per cent award of compensation already paid, $66,542.72 (R. 83). After adjusting the interest due (R. 97, 98) the award amounted to $84,074.34 with interest from August 17, 1920 (R. 89, 98), and an additional item of $8,500 denominated by the Court a "cancellation allowance", with interest from March 17, 1919.

All Profits Denied.

No allowance whatever was made for profits petitioner would have made by performance of any of the contracts (R. 93, 94, 95).

Petitioner moved for a new trial and on November 3, 1930, the Court denied the motion and filed a supplemental opinion (R. 98) adhering to its original opinion, but slightly modifying two of its special findings.

Court's Opinions and Conclusions.

In its opinions, the Court holds with respect to petitioner's contentions that its contract rights and materials were requisitioned, that "there was in fact no property taken; instead the contracts were cancelled" (R. 93); that "the contracts of the purchasers were requisitioned, and the defendant put itself in the place of the parties who made the contracts with the plaintiff" (R. 99); that "plaintiff's right to recover in the case must be determined under the Act of June 15, 1917 providing that the Government had the right to cancel all or any part of such contracts as are involved herein, and its right to recover must be limited by the rule laid down in *Russell Motor Car Co. v. U. S.*, 261 U. S. 514" (R. 99); and that petitioner "cannot be allowed for anticipated profits on any of the contracts notwithstanding the fact that if it had been permitted to complete them substantial profits would have been realized" (R. 94).

SPECIFICATIONS OF ERROR.

Although the Statute and Rules apparently do not require the filing of an assignment of errors in cases coming from the Court of Claims, petitioner in its application for certiorari (R. 4) set forth as "Reasons for Granting the Writ and Specification of Error" the following, among other errors, which are here insisted upon:

1. The Court of Claims erred in deciding that the requisitions of the three private contracts took no property from petitioner.

2. The Court of Claims erred in holding as to the three private contracts that petitioner's right to recover must be based on cancellation.

3. The Court of Claims having erred in holding that petitioner's right to recover must be based on cancellation rather than requisition, commits the further error of applying the rule for determining compensation as laid down in the Russell Motor Car Co. case to all four contracts, utterly disregarding the fact that three of the contracts were private contracts and but one of them a Government contract made after the enactment of the Act, as in the Russell case.

4. The Court of Claims erred in holding that the compensation to which petitioner is entitled with respect to the three private contracts should not include or make any allowance for the profits petitioner would have made by performance.

5. The decision of the Court of Claims is based upon an erroneous interpretation and application of the decisions of this Court in Russell Motor Car Co. v. United States, 261 U. S. 514, and Brooks-Scanlon Corporation v. United States, 265 U. S. 106.

Questions for Decision.

The ultimate questions involved are: Whether the requisition by the Government of three private contracts entered into by petitioner, a manufacturer, covering the manufacture by it of certain marine steam turbines for the other parties to the contracts took property from the manufacturer; and if so, whether just compensation therefor and for the subsequent cancellation of said contracts by the Government should include profits the manufacturer would have made by performance.

ARGUMENT.

I. The Court of Claims Found That the Three Private Contracts Were Requisitioned, But Erred in Holding That Such Requisitions Took No Property From Petitioner.

The findings show that the three private contracts, as well as the materials acquired by petitioner for performance of those contracts, were requisitioned (F. 2, R. 81; Fs. 3, 4, 5, R. 82; Fs. 7, 8, R. 84; Fs. 13, 14, R. 87; also Exhibits R. 36, 50, 63), but the Court, after conceding that petitioner is entitled to just compensation for the acts of the Government (R. 93), in its original opinion held:

> "There was in fact no property taken; instead the contracts were cancelled." (R. 93.)

And in its supplemental opinion says:

> "The contracts of the purchasers were requisitioned and the defendant put itself in the place

of the parties who made the contracts with the plaintiff." (R. 99.)

The assertion that there was in fact no property taken is erroneous and contrary to the evidence and the findings of fact and the conclusions to be drawn from those findings.

The Government having by its requisitions expropriated the purchasers' contract rights and obligations under their contracts with petitioner (*Brooks-Scanlon v. U. S.*, 265 U. S. 106, at p. 120), it necessarily follows that by the same requisitions petitioner's rights founded on the purchaser's obligations under the contracts also were taken. The rights and obligations of the respective parties to the contracts were reciprocal and dependent, and manifestly the obligations of the purchasers could not be taken or assumed without at the same time taking from the petitioner its correlative rights. Before the requisitions, the purchasers had the right to look to the petitioner to build and deliver the turbine equipment and were obligated to pay the petitioner the unpaid balance of the purchase price; and correlatively, petitioner had the right to build the turbine equipment for the purchasers with whom it had contracted, in the manner, at the times and at the prices fixed by the contracts, and to demand and receive from the purchasers the unpaid balance of the purchase price as provided in the contracts, or in the event of failure on the part of purchasers to pay the same, to recover from them compensation by way of damages for breach of the contracts, which damages would include the profits petitioner would have real-

ized by full performance. By the requisitions, the contract rights and obligations of the purchasers passed to the Government (*Brooks-Scanlon Co. v. U. S., supra,*) and the purchasers were relieved of all their obligations under the contracts and petitioner was deprived of its corresponding rights founded on the purchasers' obligations. This situation was the direct result of the requisitions and petitioner had no choice or say in the matter. *Liggett & Myers v. U. S.* 274 U. S. 215, 220. The petitioner's contract rights went with the purchasers' rights and obligations just as in *Ducket v. U. S.*, 266 U. S., 149, the tenant's rights under its lease of a pier were taken when the Government took possession and control of the pier. In that case this Court said:

> "On the face of those acts it seems to us manifest that the United States, although not taking the fee, proceeded *in rem* as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world. Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 184, 59 N. E. 763, 86 Am. St. Rep. 473; *Farnsworth v. Boston*, 126 Mass. 1, 8. In such a case we no more should expect to hear

it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use. *United States v. Welch*, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680. See *Peabody v. United States*, 231 U. S. 530, 538, 34 S. Ct. 159, 58 L. Ed. 351. Here the taking purported to be a taking of the Bush Terminal docks, etc.—not of the title of the Bush Terminal Company, but of the things, to whomsoever they belonged. The notice was "to whom it may concern". The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the subsequent appointment of a board of appraisers contemplated payment to tenants. Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

Likewise petitioner's contract rights went with the purchaser's rights, just as in *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, the franchise to take tolls went with the tangible property appropriated by the Government. There the Government contended that it did not take the franchise; that it did not need any authority from the State for the exaction of tolls if it desired to exact them, and that it

only appropriated the tangible property, and this Court answering these contentions said:

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." (P. 345.)

The latest decision bearing on this question, *International Paper Co. v. United States* (282 U. S. 399), the "total quantity and output of the electrical power which was capable of being produced and/or delivered through the use of all waters capable of being diverted through your (Niagara Falls Power Company's) intake canal" was requisitioned by the United States for war purposes. From this canal the Paper Company was entitled by lease and conveyance to draw water. The Government contended and the Court of Claims held that no property was taken from the Paper Company. This Court reversed the decision of the Court of Claims and held that in taking the water power of the river, the Government also took the Paper Company's rights in said water power, and must pay for them—just as in the case at bar, by the taking of

the purchasers' rights under the contracts in suit, the Government also took the correlative rights of the petitioner against said purchasers, and must make full compensation therefor. Mr. Justice Holmes, speaking for this Court, said:

> "There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by Government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps v. United States*, 274 U. S. 341, 343. *Campbell v. United States*, 266 U. S. 368, 370, 371. *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645, 656."

By its requisitions, therefore, the Government took from petitioner:

(a) Physical property consisting of petitioner's materials acquired for use in manufacturing the turbines called for by the contracts (F. 4, R. 82; F. 5, R.

83; F. 7, R. 84; F. 8, R. 84; R. 90; also Exhibits R. 36, 50, 63).

(*b*) Intangible property consisting of petitioner's rights under the three private contracts. These rights were definite, certain and non-cancellable, no right to change the terms of the contract or to cancel them being reserved to any of the parties to the contracts (Supple & Ballin contract, R. 27; Standifer contract, R. 39; Turbine Equipment-Luckenbach contract, R. 52, 61); and such rights had a real and substantial value based upon the assured profits petitioner would have realized by performance. These profits as found by the Court of Claims on the three private contracts aggregate $370,663.81.

II. The Court of Claims erred in holding as to the three private contracts that petitioner's right to recover must be based on cancellation.

The Court of Claims held that petitioner's right to recover must be based on cancellation. It is conceded that this is correct as to the Government contract (P. D. 1779) but not as to the three private contracts. In so holding with respect to the three private contracts, the Court completely ignored the fact that these contracts were first requisitioned (R. 81, 82) and that cancellation did not take place until about a year later (R. 87), during which year petitioner was required by respondent to continue performance of its obligations under the contracts for the benefit of the respondent. Obviously petitioner's right to the compensation, assured to it by the Constitution, accrued by reason of

the requisition and was not affected by what the Government did at a later date. *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481. When the Government cancelled the contracts, it did not thereby relieve itself of the legal consequence of its requisition.

That the Court of Claims erred in holding as above stated is apparent from the decision of this Court in *Brooks-Scanlon Corporation v. U. S.*, 265 U. S. 106. In that case petitioner sought compensation for contract rights requisitioned. The requisition there was similar to the requisitions in the instant case. The Government contended that if petitioner was entitled to any compensation, it should be solely for cancellation of its contract. This Court disposed of that contention as follows at p. 122:

> "As we hold that claimant's contract-rights were expropriated, *it is not necessary to consider what would be just compensation in case of mere cancellation of the contract.*" (Italics ours.)

III. The Decision of the Court of Claims Is Based Upon an Erroneous Interpretation and Application of the Russell Motor Car Co. and Brooks-Scanlon Cases, Supra.

Proceeding on its theory that no property was taken from petitioner and that recovery herein must be based on cancellation, the Court then decided that recovery must be limited by the rule laid down in the Russell Motor Car Co. case and consequently that the compensation to which petitioner is entitled is limited to the balance of petitioner's actual costs after crediting the

amounts received by it on account of the contracts, plus interest for delay in payment, and a cancellation allowance of $8,500, and interest thereon, without any allowance whatever for or on account of the profits petitioner would have realized on the contracts but for the acts of the Government.

In this the Court utterly disregards the lack of analogy between the facts in the *Russell Motor Car* case and those in this case with respect to the three private contracts. That case deals with a cancellation by the Government of its own contract, whereas, in the instant case the three contracts involved are private contracts to which the Government was not, in any sense, a party.

The Court further disregards the fact that the decision of this Court in the *Russell Motor Car* case, refusing to allow anticipated profits, was predicated upon the conclusion that the contract was entered into directly with the Government and, therefore, with the prospect of its cancellation in view, since the statute was binding and must be read into the contract, and the possible loss of profits, therefore, must be regarded as within the contemplation of the parties. In short, when the Russell Motor Car Company entered into its contract with the Government it impliedly agreed, because of the statute, that the Government should have the right to determine when the contract might be terminated. There was, therefore, a cancellation in the exercise of a contract right. In direct contrast, these three private contracts include no mutual agreement, express or implied, that the con-

tracts may be terminated by either party. No further argument is necessary to point out that the Russell Motor Car Co. case is, therefore, entirely inapposite to the situation here presented.

The Court of Claims, in refusing to allow anticipated profits, interprets the decision of this Court in the Brooks-Scanlon case as holding that prospective profits constitute no part of just compensation in "such cases" (R. 100) to wit, cancellation. That this construction is wrong is apparent from the following quotation from the opinion of this Court in that case, at p. 123:

> "As we hold that claimant's contract rights were expropriated, it is not necessary to consider what would be just compensation in case of mere cancellation of the contract."

The error of the Court of Claims becomes more apparent when viewed in the light of the following language of this Court in *Ingram-Day Co. v. McLouth*, 275 U. S. 471, at p. 473:

> "The statute authorized the cancellation of the government's own contracts, made after its enactment, and just compensation for such cancellation does not include anticipated profits, ordinarily recoverable in an action of assumpsit. *Duesenberg Motors Corp. v. United States*, 260 U. S. 115; *Russell Motor Car Co. v. United States*, 261 U. S. 514. *It authorized also the expropriation or requisition of private contracts, and in computing the just compensation for these the value of the anticipated performance of the contract may be considered. Brooks-Scanlon*

Corp. v. United States, 265 U. S. 106, 125." (Italics ours.)

The Court of Claims holds that under the Act compensation to be paid for cancellation of private contracts must be limited by the rule prescribed by this Court in the Russell Motor Car Co. case, *supra*, that prospective profits are not to be included. That rule, as we have just pointed out, is expressly confined in its scope and application to Government contracts made after the enactment of the Act.

Any such limitation upon the obligation to pay just compensation for the taking or cancellation of private contracts results in a deprivation of the rights guaranteed by the Fifth Amendment to the Constitution.

In *Phelps v. U. S.*, 274 U. S. 341 this Court said (p. 344)

> "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."

IV. Petitioner is entitled to just compensation in an amount which will put it in as good position pecuniarily as it would have been in if its contract rights and materials had not been expropriated.

The Fifth Amendment to the Constitution requires that just compensation be made for property taken. This Court has repeatedly held this means that the owner of property taken for public use shall be put in as good a position pecuniarily as it would have been in if its property had not been taken. *Phelps v. United States*, 274 U. S. 341, 344; *Campbell v. United States*,

266 U. S. 368, 371; *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Liggett & Myers v. United States*, 274 U. S. 215; *United States v. New River Collieries*, 262 U. S. 341, 343; *Monongahela Navigation Co. v. United States*, 148 U. S. 312.

The underlying principles of the constitutional and statutory provisions for just compensation are succinctly stated in *Seaboard Air Line Ry. Co. v. U. S.* 261 U. S. 299, at p. 304, as follows:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Company v. United States*, 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. *United States v. Rogers et al.* (C. C. A., Eighth Circuit), 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern Pacific Railway Company v. North American Telegraph Company* (C. C. A., Eighth Circuit), 230 Fed. 347, 352, and cases there cited."

These fundamental principles, expressed in varying language, are found time and again in decisions of this Court dealing with claims for just compensation for property taken, where the principles have been applied in determining the compensation or damages of the injured party.

In *Bauman v. Ross*, 167 U. S. 548, this Court said, p. 574,

> "The just compensation required by the constitution to be made to the owner is to be measured by the loss caused him by the appropriation."

Again in *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53, this Court said, at page 194:

> "The requirement of the 5th Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 194, 195."

Again in *Campbell v. U. S.*, 266 U. S. 368, this Court said, pp. 370-371:

> "And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. * * * Thereupon he became entitled to have the just compensation safe-guarded by the Fifth Amendment to the Constitution, that is the value of the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. *Seaboard Air Line Ry. Co. v. U. S.*, 261 U. S. 299, 304."

Again in *U. S. v. New River Collieries Co., supra*, this Court said, p. 343:

> "The owner is entitled to the full money equivalent of the property taken. * * * The owner cannot be required to suffer pecuniary loss. * * * The owner is entitled to what it lost by the taking."

In *Brooks Scanlon Corporation v. U. S., supra,* at page 126, the Court mentioned various factors which were to be taken into account, and given proper weight in order

> "to determine the amount claimant lost by the taking (*The Minnesota Rate Cases, supra,* 451; *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, 76; *Boston Chamber of Commerce v. Boston,* 217 U. S. 189, 195; *Monongahela Navigation Co. v. United States, supra,* 343), that is the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken."

Likewise in breach of contract and tort actions the same general principle that the injured party is entitled to compensation in money equivalent for the loss sustained is adhered to and applied. *U. S. v. Purcell Envelope Co.,* 249 U. S. 313; *U. S. v. Behan,* 110 U. S. 338. In the latter case this Court said, p. 344:

> "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures."

And at p. 345:

> "• • • the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits."

In *United States v. Spearin*, 248 U. S. 132, 135 (in which the Chief Justice was counsel for the plaintiff), this Court held that the rule enunciated in the Behan case was correctly applied and affirmed a judgment of the Court of Claims which included "a profit of $60,000" which plaintiff would have earned had he been allowed to complete the annulled contract.

In *Guerini Stone Company v. Carlin Construction Company*, 248 U. S. 334, 347, this Court again reviewed its decision in the Behan Case and approved an instruction to the jury given by the District Judge that plaintiff was entitled to the profits which could have been made if allowed to complete the work under contract.

In *Williston on Contracts, Volume III, Section* 1338, it is said:

> "In fixing the amount of these damages, the general purpose of the law is, and should be to give compensation—that is to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."

In *Standard Oil Co. v. Southern Pacific Ry. Co.*, 268 U. S. 146, which was an action in tort, this Court said, p. 155:

> "It is fundamental in the law of damages that the injured party is entitled to the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, *and thereby to be put in as good a position pecuniarily as if his property had not been destroyed.*" (Italics ours.)

(The language just quoted is from the opinion of Mr. Justice Butler. The portion in italics is the same in effect as that used by him in the *Seaboard Air Line* case (*supra*), and again in the *Brooks-Scanlon* case (*supra*), both with reference to just compensation for property taken.)

V. The just compensation to which petitioner is entitled should include the profits petitioner would have made by performance of the requisitioned contracts.

We have shown that the performance took from petitioner its property rights in the contracts. Among these rights was the right to the profits petitioner would have made by performance, and the right, in the event of the failure of the purchasers to perform, to recover from them compensatory damages which would include the profits.

The Court of Claims has found that petitioner could have fully performed its obligations under the contracts at a cost substantially less than the prices definitely fixed by the contracts and thereby would have made profits aggregating $370,663.81. Notwithstanding this it refused to allow these profits and allowed only petitioner's out of pocket costs and expenses. Just why it should have placed the profits in a different category is not apparent. Petitioner was deprived of the profits by the same acts of respondent that took the other property for which allowance was made. One cannot but feel that the reasoning which leads to results so unjust and anomalous must be fallacious.

If the contracts had been fully performed, petitioner would have realized the profits, but respondent did not

perform and, of course, the purchasers did not perform, for, the requisitions released them from their obligations. Had there been no intervention by respondent and had the purchasers failed to perform, in an action for such breach, such profits would certainly be allowed in their entirety as an element of compensation for petitioner's loss.

Masterton v. Mayor, 7 Hill., 61;
United States v. Behan, 110 U. S., 338;
Hinckley v. Pittsburgh Steel Co., 121 U. S., 264;
United States v. Purcell Envelope Co., 249 U. S., 313.

What petitioner could have recovered from its purchasers in the event they failed to perform is a true reflection of what petitioner actually lost by respondent's acts. Just compensation is compensatory in no truer or more exact sense than damages recoverable at law are compensatory.

It may be said that an action for breach of contract and these proceedings are basically different. True they may be in their technical aspects but viewed from the standpoint of the end to be accomplished, they are identical. Each aims to afford just compensation that will be a full and perfect equivalent for the damage inflicted. (*See authorities cited, Point IV.*)

In *Monongahela Navigation Co. v. U. S.*, *supra*, this Court speaking of the elements that entered into the determination of just compensation for the property (lock and dam and franchise to collect tolls) taken, said at page 329:

"In this case, it being property devoted to a public use, the amount of compensation was subject to the determination of the State of Pennsylvania, the State which authorized the creation of the property. *The prices which may be exacted under this legislative grant of authority are the tolls, and these tolls, in the nature of the case, must enter into and largely determine the matter of value.* In the case of *Montgomery County v. Bridge Company,* 110 Penn. St. 54, 58, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: 'The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, *to measure the damages by the mere cost of building* the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible, corporeal property. *Their value necessarily depends upon their productiveness.* * * *'

"So, before this property can be taken away from its owners, the whole value must be paid; and *that value depends largely upon the productiveness of the property, the franchise to take tolls.*"

Does not the value of contract rights such as those, *sub judice,* depend upon their productiveness? And is not their ultimate productiveness to the seller what they will net to him? And what better evidence of

what they will net to him is there than the profits which they would have made for him?

The refusal of the Court of Claims to allow profits is in direct conflict with *American Hawaiian S. S. Co. v. U. S.*, 283 Fed. 535. In that case the Steamship Company had leased one of the Bush Terminal piers and in turn had sublet the pier to the Russian Volunteer Fleet at a rental greatly in excess of the rental it paid. The Government under its war-time powers took control and possession of the pier. The Steamship Company sued to recover just compensation for the use of the pier and the compensation awarded to it included the profits it would have made under the sub-lease. The Government's appeal to this Court was dismissed, 263 U. S. 727, and a subsequent motion by the Government to vacate the judgments docketing and dismissing and to enlarge time for docketing the case was denied, 44 Sup. Ct. Rep. 136. See also *Prince Line, Ltd. v. U. S.*, 283 Fed. 535.

Likewise the refusal of the Court of Claims to allow profits is in direct conflict with the following cases:

New River Collieries Co. v. U. S., supra;
Campbell v. U. S., supra;
Phelps v. U. S., 274 U. S. 341; 61 C. Cls. 1044;
Duckett v. U. S., 266 U. S. 149; 60 C. Cls. 1034;
Booth & Company, Inc., v. U. S., 61 C. Cls. 805.

All of the cases above referred to grew out of requisitions of property during the war. In each, the compensation allowed included the full market value of the property taken. This was in excess of cost and thus, in truth and in fact, prospective profits were allowed to the full.

Whether a profitable contract be appropriated for use or confiscated for destruction; whether it be breached, abandoned or cancelled, under the uniform course of decision in this Court the measure of compensation is always the same—what it would have produced to the owner.

There is no "blinking the consequences": the just compensation to which petitioner is entitled must perforce of the demand of common justice and the irresistible logic of the cited opinions of this Court include its assured prospective profits.

Conclusion.

It is respectfully submitted that the decision of the Court of Claims is erroneous and should be reversed and that Court should be directed to enter judgment for petitioner for an amount which will give it full compensation, *including the profits it would have made* by performance of the contracts, together with interest.

Respectfully submitted,

GEORGE C. HOLTON,
JOHN S. FLANNERY,
Counsel for Petitioner.

GEORGE F. LOSCHE,
FRANK F. NESBIT,
of Counsel.

APPENDIX A.

Act June 15, 1917 (40 Stat. 182).

EMERGENCY SHIPPING FUND.

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(*a*) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(*b*) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(*c*) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(*d*) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(*e*) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

FILE COPY

FILED
APR 10 1931
CHARLES ELMORE CROP
CLERK

No. 6[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1930

DE LAVAL STEAM TURBINE COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for not opposing the petition	4

CITATIONS

Statutes:	
Act of March 4, 1917, c. 180, 39 Stat. 1168, 1193	5–6
Act of June 15, 1917, c. 29, 40 Stat. 182, 183	6–7

51104—81

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 685

DE LAVAL STEAM TURBINE COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose this petition.

OPINION BELOW

The opinions of the Court of Claims (R. 89, 98) have not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 30, 1930. (R. 79.) A motion for new trial was overruled on November 3, 1930. (R. 81.) The petition for certiorari was filed on January 29, 1931. (R. 105.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a construction company which had entered into three contracts with various parties to construct marine steel turbines and kindred equipment (two of which were entered into after March 4, 1917, and the other after June 15, 1917) is entitled as a part of the just compensation for the requisition of those contracts by the Government or for subsequent cancellation of the contracts by the Government to any allowance on account of the anticipated profits which it would have made if the contracts had been fully performed.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 6–8.

STATEMENT

The petitioner, a manufacturer of marine steam turbines, contracted on March 15, 1917, to manufacture certain products for the Turbine Equipment Company. (R. 81–82, 52.) On May 11, 1917, the petitioner made a similar contract with Supple & Ballin. (R. 81–82, 27.) In December, 1917, it made a similar contract with G. M. Standifer Corporation. (R. 81–82, 39.) In the early part of the year 1918 the Fleet Corporation, acting for the President, requisitioned the contracts of these three purchasers and ordered the petitioner to deliver to the Fleet Corporation the products called for by the contracts. (R. 82.) Soon afterwards

the Fleet Corporation ordered certain additional equipment from the petitioner. (R. 82, 83.) From time to time these contracts were modified, and they were finally cancelled after the Armistice by the Fleet Corporation. (R. 83, 84.)

The petitioner considered the award of just compensation by the Fleet Corporation insufficient. Seventy-five per cent of this award was paid petitioner on August 17, 1920 (R. 83), and it brought this suit in the Court of Claims to have the correct amount of compensation determined.

The Court of Claims held that anticipated profits on any of the contracts should not be included in the award. (R. 94.) It computed compensation as follows: The excess of the petitioner's actual costs and expenditures over the cash payments received on the contracts totaled $116,231.66. (R. 88, 89.) To this sum the court added $30,000 damages for extraordinary expense due to stoppage of work (R. 98, 95), and $15,000 for cost of storing materials after the work was stopped (R. 98, 84). From this total it subtracted the salvage value of the materials, $20,149.88 (R. 98, 85), and the seventy-five per cent award of compensation already paid, $66,542.72 (R. 83). After adjusting the interest due (R. 97, 98) the award amounted to $84,074.34 with interest from August 17, 1920. (R. 89, 98.) To this the court added the sum of $8,500 as the value of the contracts at the date of cancellation, with interest from March 17, 1919,

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner pro-

vided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct.

The word "person," as used herein, shall include any individual, trustee, firm, association, company, corporation, or contractor.

The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

The word "material" shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof.

The word "plant" shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction or any process; any shipyard or dockyard and discharging terminal or other facilities connected therewith.

The words "United States" shall include all lands and waters subject to the jurisdiction of the United States of America.